No. 82

IN THE

# Supreme Court of the United States

October Term, 1964

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SERGEANT HERBERT N. CARRINGTON,
Petitioner

v.

ALAN V. RASH, ET AL.,
Respondents

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## BRIEF OF RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF THE STATE OF TEXAS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 1108

IN THE

# *Supreme Court of the United States*

October Term, 1963

SERGEANT HERBERT N. CARRINGTON,
Petitioner

v.

ALAN V. RASH, ET AL.,
Respondents

## BRIEF OF RESPONDENT WAGGONER CARR, ATTORNEY GENERAL OF THE STATE OF TEXAS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Waggoner Carr, Attorney General of the State of Texas, opposes the granting of the petition for writ of certiorari because the Supreme Court of Texas has correctly decided the question raised by the petition and no substantial federal question is presented.

## STATEMENT OF THE CASE

In addition to the statement appearing in the petition, the following information will assist in a proper evaluation of this case.

The provision in Article VI, Section 2 of the Constitution of Texas which limits voting by persons in military service to the county of residence at the time of entering service was added by an amendment which became effective on November 19, 1954. This is the first case decided by any court above the district court which rules on any question connected with that provision. The only other decided case is one by a state district court (*Mabry v. Davis,* No. F-158882, in the 45th District Court of Bexar County, Texas), in which the court on January 28, 1964, denied relief to the plaintiff, a person in military service in essentially the same status as Petitioner in the present case, who sought to compel the County Tax Assessor-Collector of Bexar County to remove the notation "Not eligible to vote" from the poll tax receipt issued to him. Another case, brought by the same plaintiff and another against the County Tax Assessor-Collector and the Attorney General of Texas, was filed in the United States District Court for the Western District of Texas on March 23, 1964, alleging violation of Article I, Sections 2 and 4 of the United States Constitution and of Sections 1 and 2 of the Fourteenth Amendment (*Mabry et al. v. Davis et al.,* Civil Action No. 3395—San Antonio). It is set for trial before a three-judge court during the week of July 13, 1964.

Within less than a month after the effective date of the 1954 Amendment, the Attorney General of Texas rendered an opinion construing its provisions. This opinion, numbered S-148 and rendered on December 18, 1954, was reaffirmed in Opinion C-173, rendered on November 6, 1963, to the County Attorney of El Paso County, Texas. According to the statement of Respondent Rash in a letter to Petitioner's attorney on March 23, 1964 (attached as Exhibit "C" to the petition for writ of mandamus in the Supreme Court of Texas), it

was this latter opinion which led him and Respondent Hockenberry to refuse to permit Petitioner to vote. These two opinions are reproduced in an appendix to this brief. They are in harmony with the majority opinion rendered by the Supreme Court of Texas in this cause. They were the most authoritative interpretation of the law in existence prior to the 1964 court decisions, and hence it may be said that at the time Petitioner voluntarily chose to become a legal resident of Texas, he had full notice of the construction of the Texas law and of the effect which his choice would have on his voting rights.

In the Supreme Court of Texas, Petitioner contended that the Attorney General's opinions had misconstrued the Texas law in holding that it applied to persons who entered military service as residents of some State other than Texas. The Supreme Court held against him on that point. That construction is binding in this Court, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 99 (1952), and the point was not brought forward.

The Supreme Court of Texas also interpreted the purpose of the restriction in the Texas law as being "to prevent a concentration of military voting strength in areas where military bases are located." This interpretation is likewise binding on the federal courts, irrespective of the nature of the evidence upon which the state court based its finding. We might state, however, that the Court had before it ample evidence for this finding, in the form of declarations by the sponsor of the Amendment in the Texas Legislature and other documentary evidence showing that the Legislature intended this to be the purpose when it proposed the Amendment and that the people so understood its purpose when they adopted it. This evidence was presented

without objection from Petitioner in the brief filed in that Court by Respondent Carr.

## NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

### A. Reasonableness of the Classification

Petitioner contends that the Texas law limiting voting by persons in military service to the county of residence at the time of entering service violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The rule for testing validity of state action under the equal protection clause is summed up in the following quotation from *McGowan v. State of Maryland,* 366 U.S. 420, 425 (1960):

> "* * * Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The question, then, is whether the classification is reasonable: do persons in military service constitute a class which may properly be treated differently from other persons? The burden is on Petitioner to prove its unreasonableness. *Madden v. Commonwealth of Kentucky,* 399 U.S. 83, 88 (1940).

This action was brought as an original mandamus proceeding in the Supreme Court of Texas. That Court

does not hear evidence, and jurisdiction in original proceedings is entertained only when there are no disputed fact issues involved in the case. In these circumstances, Petitioner did not have an opportunity to "prove" the unreasonableness of the classification by producing evidence to show, for example, that there is no existing military installation where the number of military personnel assigned to it outnumbers the civilian population in the immediate area and no likelihood that such an installation will exist in the future; or that there is no likelihood that a military commander might seek to control local affairs and no possibility that he could influence the vote of the persons under his command; that persons in military service, in their relation to the interests, needs and aims of the communities where they are stationed, have attitudes and outlooks no different from those of the civilian population, or that within the class they have differences of viewpoints just as the civilians do, and in relatively corresponding proportions; or that, granting that by and large the military population is likely to think and feel differently from the civilians toward local matters, the difference is innocuous and could not have a harmful effect on local affairs.

Petitioner makes a plea of inequity by cataloging the facts in his individual case. He has been in service for almost 20 years and is already looking to the time when he will retire. He and his family have chosen El Paso as the place where they will "settle down," and they are already putting down roots to become permanently a part of the community life where they now live.

Is this typical of persons in military service? What percentage of the men who are stationed at the White Sands installation where he serves have similar pur-

pose? Is it usual among military personnel generally that most of them intend to remain permanently at the place where they are stationed, and could they do so even if they so desired? Common knowledge bears witness to the contrary. The record is silent as to where Sergeant Carrington served during the years from 1946 to 1962. If it happens that he served some of that time at or near some other location in Texas, or if it had so happened, could he have made the same claim with respect to that place?

Petitioner's present situation may make a strong appeal as to the injustice of denying him the privilege of voting at the place where he intends to remain permanently. The equities in his case may be different from the average military man, but he is still a member of the class. The reasonableness of the classification is not to be tested by the isolated example. *Lindsley v. Natural Carbonic Gas Company*, 220 U.S. 61, 78 (1911); *Spahos v. Mayor & Councilmen of Savannah Beach, Ga.*, 207 F.Supp. 688, 692 (S.D. Ga. 1962), affirmed 371 U.S. 206.

Respondent submits that Petitioner could not have proved that the classification is unreasonable, even if he had had an opportunity to do so. Facts of common knowledge, of which the courts may take judicial notice, adequately demonstrate that there is a reasonable and substantial basis for distinction. In any event, the circumstance that Petitioner in the present action did not have an opportunity to make proof of unreasonableness because of the forum he chose for bringing the action does not relieve him of the burden.

The majority of the Supreme Court of Texas found a reasonable basis for treatment of persons in military service, saying:

"Persons in military service are subject at all times to reassignment, and hence to a change in their actual residence. They are residents in a particular place for a particular period of time under compulsion of military orders; they do not elect to be where they are. Their reasons for being where they are, and their interest in the political life of where they are, cannot be the same as the permanent residents. This is not to say that military personnel are any less citizens; it is to say that military personnel in the nature of their sojourn at a particular place are not, and cannot be, a part of the local community in the same sense as its permanent residents. Denying to such personnel the right of suffrage in the place where they may be stationed—while in no sense denying the exercise of such right in their place of original residence—is not unreasonable and the classification established is nondiscriminatory. The voting restrictions operate alike upon all members of the class." (Appendix, Petition for Writ of Certiorari, p. 3a.)

The power of each State to determine who shall constitute its electorate, subject only to specific restrictions in the United States Constitution, has been confirmed by this Court many times. It was stated in *Pope v. Williams,* 193 U.S. 621, 632 (1904), and in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45, 50 (1959), cited in the majority opinion of the Supreme Court of Texas. It was reiterated most recently in *Gray v. Sanders,* 372 U.S. 368, 379 (1963). The Texas law clearly falls within the State's power to prescribe qualifications and conditions for voting.

Petitioner relies on *Gray v. Sanders* as supporting his contention. As we understand that case, it dealt solely with the weight to be given to the vote of a qualified elector, and the power of the State of Georgia to give the vote of one of its qualified electors greater effect than that of another. It had nothing to do with

the State's power to determine who are its qualified electors. In this connection, it is interesting to note that the Constitution of Georgia contains a provision which apparently has the same effect as the Texas law, at least in some circumstances. Section 2-702 of the Georgia Constitution reads:

> "Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people: *Provided, that no soldier, sailor or marine in the military or naval services of the United States shall acquire the rights of an elector by reason of being stationed on duty in this State.*" (Emphasis supplied.)

The annotated edition of the Georgia Statutes available to us does not show any annotations of decisions construing the proviso, and we are not informed on how it has been construed administratively. While usually not prohibiting acquisition of residence under all circumstances, it is not unusual for state constitutions and statutes to restrict in some manner the power of an individual in military service to acquire residence at the place where he is stationed. We submit that a State could deny to persons in military service the power to acquire a domicile within the State while serving under orders which made them subject to reassignment at any time. But Texas does not go that far. She permits the person in military service to become a legal resident for all purposes except voting, thereby being able to escape the burdens which might have been imposed on him by the State of his former residence (e.g., state income tax) and to acquire privileges for himself or members of his family which the State of Texas accords to its residents (e.g., the privi-

lege of attending state-supported colleges on resident tuition charges). The fact that Texas allows a person, present within this State under circumstances which ordinarily would not vest him with the status of a resident, to acquire that status by the exercise of his free choice, should not prevent the State from restricting and regulating the privileges accompanying a residence so acquired.

In the Supreme Court of Texas, the only ground of invalidity alleged by Petitioner was violation of the equal protection clause of the Fourteenth Amendment. Apparently that also is the only ground urged in this Court, but the argument on pages 8 and 9 of the petition for writ of certiorari take on overtones of the privileges and immunities clause. Inapplicability of that provision to abridgment of suffrage was settled in *Minor v. Happersett*, 21 Wall. 162 (1875), which held that a state law withholding suffrage from women did not violate the privileges and immunities clause of the Fourteenth Amendment. The fact that amendment of the Constitution was deemed necessary to secure voting rights for women confirms that denial of suffrage to women likewise did not violate the equal protection clause. (It seems apparent to the writer of this brief that with respect to voting rights and privileges there is far more substantial basis for classifying the military separately from the civilian citizens than for classifying the female separately from the male citizens; and that the history of "woman suffrage" and the Nineteenth Amendment furnishes the answer to Petitioner's contention.)

Even assuming that every adult citizen of the United States has a right to vote, Petitioner voluntarily relinquished that right upon his choice to become a resident of Texas. The following statement is made on page 9 of the petition:

"* * * [T]here are no facts in this case which indicate that Petitioner voluntarily gave up his right to vote in his original state of residence. Under the facts of this case, since Petitioner was only 18 years of age when he entered the service, it is most likely that he never had an opportunity to acquire a voting residence in any state before moving to Texas."

Every State and Territory of the United States permits its residents to maintain residence during absence in military service, and if a resident is a qualified elector under the laws of the State, he may vote in its elections. Indeed, every State and Territory except Puerto Rico has laws providing for absentee voting by persons absent in military service. See *Voting Information 1964,* Pamphlet DoD Gen-6, published 12 December 1963 by Armed Forces Information and Education, U. S. Department of Defense, Washington, D. C.

Petitioner entered military service as a resident of Alabama. The pertinent provisions of the Alabama law are contained in Title 17, Sections 17 and 64(16) of the Code of Alabama 1940 (Recompiled 1958), which read:

"§ 17. *Residence not acquired or lost by temporary absence.*—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state."

"§ 64(16). *'Absentee voter' defined; qualified ab-*

*sentee voters' list; method of voting; delivery of absentee ballots.*—(a) Any qualified elector of this state who is in service as a member of the armed forces of the United States, whose regular duty requires that he be absent from the county of his residence on the date any primary, general, special, or municipal election is to be held, and any qualified elector who is the wife of any such elector in service who resides with him at his duty station, or any qualified elector who is a disabled veteran confined in a facility or hospital operated by the veterans administration, may vote in the election in the manner and under the regulations hereinafter prescribed. * * *"

Alabama law requires that a person be 21 years old in order to vote. Although Petitioner was not a qualified voter at the time he entered service, as a resident of the State he would have acquired the right to vote in Alabama three years later upon reaching majority.

The facts alleged in this case are that Petitioner entered service at 18 years of age as a resident of Alabama. At that time his residence (domicile) was fixed by that of his parents. The allegations do not expressly negative the possibility that Petitioner's legal residence had been changed by the removal of his parents to some other place before he became 21 years old, or that after becoming 21 years old he had voluntarily established a legal residence at some other place. We assume that he had not; in any event he had a domicile at some place, and he could have continued to maintain it at that place so long as he remained in service, if he had wished to do so. His relinquishment of residence and concomitant voting privileges was by his own choice, with notice of the consequences when he chose to become a resident of Texas.

## B. Contemporaneous Construction of the Fourteenth Amendment as Applied to Restrictions on Voting by Persons in Military Service

From 1837, when Texas was a newly-founded republic, until amendment of the State Constitution in 1954, the laws of Texas disfranchised part or all of its residents who were in military service. If total denial of voting privileges did not violate the Fourteenth Amendment, it would necessarily follow that the present restriction also is not invalid on that ground. The purpose of this section of our brief is to show that the Congress of the United States in 1870 interpreted this complete disfranchisement as not violating the Fourteenth Amendment; that this contemporaneous construction would be entitled to great persuasive weight in a determination of its validity; and that validity of the former provision would encompass validity of the present restriction on place of voting.

The Fourteenth Amendment was proposed to the legislatures of the several States on June 16, 1866, and proclamation of its ratification was issued on July 28, 1868. On November 30, 1869, the people of Texas ratified a new constitution which had been proposed by a constitutional convention convened under the Reconstruction Acts of Congress passed March 2, 1867 and Acts supplemental thereto, with the express view of seeking readmission to the Union. This Constitution of 1869 contained the following provisions under Article III, entitled Legislative Department:

> "Section 1. Every male person who shall have attained the age of twenty-one years, and who shall be (or who shall have declared his intention to become) a citizen of the United States, or who is, at the time of the acceptance of this Constitution by the Congress of the United States, a citizen of Texas, and shall have resided in this State one

year next preceding an election, and the last six months within the district or county in which he offers to vote, and is duly registered (Indians not taxed excepted) shall be deemed a qualified elector; and should such qualified elector happen to be in any other county, situated in the district in which he resides, at the time of an election, he shall be permitted to vote for any district officer: Provided, that the qualified electors shall be permitted to vote anywhere in the State for State officers; And provided further, that *no soldier, seaman, or marine, in the army or navy of the United States, shall be entitled to vote at any election created by this Constitution.*" (Emphasis supplied.)

Section 1 of Article VI, entitled Right of Suffrage, read:

"Section 1. Every male citizen of the United States, of the age of twenty-one years and upwards, *not laboring under the disabilities named in this Constitution,* without distinction of race, color, or former condition, who shall be a resident of the State at the time of the adoption of this Constitution, or who shall thereafter reside in this State one year, and in the county in which he offers to vote sixty days next preceding an election, shall be entitled to vote for all officers that are now or hereafter may be elected by the people, and upon all questions submitted to the electors at any election; Provided, that no person shall be allowed to vote, or hold office, who is now, or hereafter may be, disqualified therefor, by the Constitution of the United States, until such disqualification shall be removed by the Congress of the United States: Provided further, that no person, while kept in any asylum, or confined in prison, or who has been convicted of a felony, or who is of unsound mind, shall be allowed to vote or hold office." (Emphasis supplied.)

Texas was readmitted to the Union by an Act of Con-

gress approved March 30, 1870 (16 Stat. 80). The preamble of this Act read:

> "Whereas, The people of Texas have framed and adopted a constitution of State government which is republican; and whereas the Legislature of Texas, elected under said constitution, has ratified the fourteenth and fifteenth amendments to the Constitution of the United States; and whereas the performance of these several acts in good faith is a condition precedent to the representation of the State in Congress: Therefore, Be it enacted * * *"

The Act contained the following proviso:

> "* * * And provided further, That the State of Texas is admitted to representation in Congress as one of the States of the Union, upon the following fundamental conditions: First, That the Constitution of Texas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: Provided, That any alteration of said constitution, prospective in its effects, may be made in regard to the time and place of residence of voters. * * *."

The provisos inserted in the Texas Readmission Act and in the Acts readmitting other States make it clear that Congress scrutinized with great care the constitutions under which the States were readmitted. 15 Stat. 73, 74, 16 Stat. 59, 60 (Georgia); 16 Stat. 62, 63 (Virginia); 16 Stat. 67, 68 (Mississippi). Moreover, Section 5 of the Fourteenth Amendment gives the Congress the power to enforce that Article of Amendment by appropriate legislation. Disfranchisement of mili-

tary personnel by the Texas Constitution continued until 1954, and there was at least one other State which disfranchised members of the regular military establishments for a long period of time.[1] Yet in all those years there was never an act of Congress outlawing the disfranchisement, and so far as we have been able to find there was never a court decision declaring it to be invalid.

The failure of the Congress which readmitted Texas to insist upon deletion of the provision in Article III, Section 1 which disfranchised soldiers, seamen and marines can only be taken as a construction by the Congress that this provision did not offend the Fourteenth Amendment. It is a settled rule that the contemporaneous and practical construction of constitutional provisions by the legislative branch, in the enactment of laws, has great weight and gives rise to a strong presumption that the construction rightly interprets the meaning of the provisions. *Williams v. United States,* 289 U.S. 553, 573 (1933); *Ex parte Quirin,* 317 U.S. 1, 41 (1942).

We have, then, a contemporaneous construction by the Congress of the United States, the body entrusted with power to enforce the mandates of the Fourteenth Amendment, that the former provision of the Texas Constitution completely disfranchising persons in military service did not violate that Amendment. If their

[1]Until amended in 1920, Article VII, Section 3 of the Nebraska Constitution of 1875 (now Art. VI, Sec. 3) read: "Every elector in the military or naval service of the United States or of this state, and not in the regular army, may exercise the right of suffrage at such place and under such regulations as may be provided by law." This provision was taken as not permitting anyone in the "permanent military establishment, which is maintained both in peace and war" to vote in Nebraska. *State v. Moorhead,* 102 Neb. 76, 167 N.W. 70 (1918); 29 C.J.S., Elections, § 16, p. 37.

complete disfranchisement is not proscribed, then clearly the present restriction also does not offend its terms.

## WHETHER THE QUESTION IS MOOT

Petitioner has suggested that the Attorney General might contend that this case has become moot, because the election for which Petitioner sought a writ of mandamus has already been held. On the authority of *Gray v. Sanders*, 372 U.S. 368 (1963), Respondent feels that this Court does not consider the case to be moot, since the provision under attack, as construed by the Supreme Court of Texas, would continue to govern future elections at which Petitioner would be entitled to vote if the provision is invalid.

## CONCLUSION

Respondent asks that the petition for writ of certiorari be denied, because the question raised in the petition was correctly decided in the Supreme Court of Texas and no substantial federal question is presented in this Court.

Respectfully submitted,

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## PROOF OF SERVICE

I, MARY K. WALL, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 12th day of June, 1964, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on W. C. PETICOLAS, attorney for Petitioner, by mailing a copy in a duly addressed envelope, with first air mail postage prepaid, at the address of 12E El Paso National Bank Bldg., El Paso 1, Texas.

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MARY K. WALL

# APPENDIX

## OPINIONS OF THE ATTORNEY GENERAL OF TEXAS CONSTRUING THE TEXAS LAW ON PLACE OF VOTING BY PERSONS IN MILITARY SERVICE

### 1. Opinion No. S-148, rendered December 18, 1954.

Hon. Robert S. Calvert
Comptroller of Public Accounts
Austin, Texas

Opinion No. S-148

Re: Construction of constitutional amendment adopted November 2, 1954, concerning voting by members of the armed forces.

Dear Mr. Calvert:

You have requested an opinion relating to the construction and effect of the constitutional amendment adopted November 2, 1954, amending Sections 1 and 2 and repealing Section 2a of Article VI, Constitution of Texas, concerning voting by members of the armed forces. Your questions are as follows:

> "1. What is the effective date of the Constitutional Amendment voted upon at the General Election on November 2, 1954, which repeals Section 2a of Article VI and amends Sections 1 and 2 of Article VI of the Texas Constitution?
>
> "2. Does this amendment make any distinction between members of the regular military establishment of the United States and officers or enlisted men of the National Guard of Texas, the National Guard Reserve, the Officers Reserve Corps of the United States, or draftees?
>
> "3. If your answer to the second question is in the negative, will it be necessary for any member of the Armed Forces of the United States or com-

ponent branches thereof, or in the military service of the United States, to pay his or her poll tax in the county in which he or she resided at the time of entering such service, so long as he or she is a member of the Armed Forces?

"4. Do you construe Section 2 to mean that a poll tax is levied only on persons between the ages of 21 and 60; and that the State poll tax levy will still be $1.50, but that members of the National Guard will still pay the State poll tax of $1.00, as referred to in Articles 5840 and 5841?"

A constitutional amendment becomes a part of the Constitution on the date of the official canvass showing that the amendment received a majority vote. *Wilson v. State,* 15 Tex. Ct. App. 150 (1883); Att'y Gen. Op. S-146 (1954). The votes of the election held on November 2, 1954 were canvassed on November 19, 1954, and the official canvass showed that the amendment had been adopted. It therefore became effective on November 19. By its express terms, Section 2 of Article VI is self-executing. The provisions amending Section 1 and repealing Section 2a are likewise self-executing and become operative without further legislation. Att'y Gen. Op. S-146, supra. All statutes in conflict with these constitutional provisions are now superseded.

In answer to your second question, the amendment does not make any distinction between members of the regular military establishment of the United States and members of the National Guard, reservists, or draftees. Previously, the members of the regular military establishment were disfranchised, while the other groups were not. Under the new amendment, the provision in Section 1 of Article VI disqualifying members of the regular military establishment has been omitted, and no person is now disqualified as an elector

by reason of his military status. However, a provision has been added to Section 2 of Article VI which reads:

> "... Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Formerly, National Guardsmen, reservists, and draftees in active service could vote at the place of their legal residence at the time of voting (provided they had resided within the State for one year and within the county for six months) without regard to the place of residence at the time they entered service. Active members of the regular establishment could not vote at all. Now, all these groups are qualified electors if they meet other requirements, but none of them may vote anywhere in Texas except in the county where they resided when they entered service. If a person in military service changes his legal residence to some place other than the county in Texas in which he resided at the time he entered service, he cannot vote in this State.

Throughout this opinion the term "residence" means legal residence as distinguished from actual residence.

The constitutional amendment does not change the rules for determining what place is the legal residence of the voter, nor does it mean that in all circumstances a person in military service will be entitled to claim a voting residence in the county of which he was a resident at the time he entered service. Place of residence is still to be determined in the same way that it has always been. Absence from the county or State for the purpose of performing military service does not of

itself cause a loss of residence, but it is possible for a person to abandon his old residence and acquire a new residence during time of service. Tex. Const. Art. XVI, Sec. 9; *Clark v. Stubbs,* 131 S.W. 2d 663 (Tex. Civ. App. 1939); *Struble v. Struble,* 177 S.W. 2d 279 (Tex. Civ. App. 1943); *Pettaway v. Pettaway,* 177 S.W. 2d 285 (Tex. Civ. App. 1943); *Robinson v. Robinson,* 235 S.W. 2d 228 (Tex. Civ. App. 1950); 15 Tex. Jur. 715, Domicile, Sec. 6. If he does so, and thereby changes his residence to some other county, he loses his right to vote in this State while he continues in service, unless he re-establishes his residence in the county in which he resided when he entered service. Further, no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.

It is our opinion that the restriction to voting in the county of residence at the time of entering service applies only to persons who are on extended active duty. Members of the National Guard and reservists who are not on extended active service and retired military personnel are not subject to this restriction. Further, "county of residence at the time of entering such service" means the county in which the person resided at the time he began his current active service. To illustrate: A person, while residing in County A, joins one of the reserve components but does not go into active service. He later moves to County B. After he has fulfilled the length of residence requirement, he may vote in County B; in fact, he could vote nowhere else. While living in County B, he is called into active service. During this time his place of voting is in County B, the county in which he resided when he went into active service. After his release from that tour of duty, he changes his residence to County C. His place of voting is in County C so long as he continues to live

there. If he is again called into active service while living in County C, that is the place where he will vote.

Your third question concerns the payment of the poll tax by persons in military service. They are subject to payment of a poll tax to the same extent and in the same manner as all other residents of the State. Heretofore, by virtue of Section 2a of Article VI, qualified electors in military service were not required to pay the poll tax as a condition precedent to voting during time of war and for a certain period after its termination, but the recent amendment repealed this section of the Constitution. Hereafter, all persons in military service must pay a poll tax before February 1 in order to vote, unless they come within one of the exemptions. If they are exempt under the general law, they must comply with the requirements relating to obtaining exemption certificates.

If a person is subject to the poll tax, he owes it in the county of his legal residence on the first day of January preceding its levy. *Linger v. Balfour,* 149 S.W. 795, 805 (Tex. Civ. App. 1912); *McCharen v. Mead,* 275 S.W. 117 (Tex. Civ. App. 1925). It should be noted that liability to the poll tax is not limited to qualified electors. It is levied against *all* residents between the ages of 21 and 60 years,[1] regardless of whether they are qualified electors. Ordinarily, a person in military service continues to maintain his legal residence at the place where he resided when he entered service. In that case, he is subject to payment of the poll tax in that county, and he may vote in that county if he is

[1]Certain classes within these age limits are exempt from the 50-cent statutory part of the state tax and from county and city poll taxes, but all persons between 21 and 60 are liable for the constitutional $1.00 tax. *Tondre v. Hensley,* 223 S.W. 2d 671 (Tex. Civ. App. 1949); Art. 5.09, Vernon's Texas Election Code.

otherwise qualified. However, if he should happen to change his residence to some other county during military service, he would be subject to payment of the tax in the county of his new residence; but payment of the tax would not entitle him to vote in the county of his former residence, nor could he vote in the county of his new residence. And, of course, voluntary payment of the tax in the county of his former residence would not entitle him to vote in that county.

This brings up the question of the form of the poll tax receipt to be issued to persons in military service. They should be issued the regular receipt form and should be placed on the poll tax rolls in the same manner as other poll tax payers. In the few instances where persons change their residence during military service, the regular receipt form will still be used, even though the holder cannot vote on it unless he is released from active service. As already pointed out, there are other instances in which poll tax holders are not entitled to vote, yet the statute makes no provision for issuance of a special form of receipt except where the taxpayer is an alien or where the tax is paid after January 31. Arts. 5.12 and 5.14, Vernon's Texas Election Code.

In answer to your fourth question, you are advised that the recent amendment does not make any change in the poll tax laws. The tax is levied only on residents between the ages of 21 and 60 years. Art. 5.09, Vernon's Texas Election Code. The state poll tax is still $1.50, and counties may levy a tax not to exceed 25 cents. Art. 7046, V.C.S. Members of the National Guard will still pay the constitutional state tax of $1.00 but will be entitled to exemption from the balance of the tax upon compliance with Article 5841, V.C.S.

## Summary

The constitutional amendment relating to voting by persons in military service, adopted on November 2, 1954, became effective on November 19, 1954. The amendment is self-enacting and supersedes all conflicting statutes.

The amendment removes the voting disqualification against members of the regular military establishment. All persons in military service are now qualified electors if they meet other constitutional requirements. However, a person in military service may vote only in the county in which he resided at the time he entered service. This restriction applies only to persons on extended active duty; it does not apply to members of the National Guard and reservists who are not on extended active duty.

While absence from one's place of residence during military service does not of itself cause a loss of residence, it is possible for a person to abandon his old residence and acquire a new one while he is in service. If he does so, and thereby changes the county of his residence, he cannot vote so long as he continues in service, unless he reestablishes his legal residence in the county in which he resided when he entered service.

The amendment repealed Section 2a of Article VI of the Constitution of Texas, which waived payment of the poll tax by military personnel as a condition precedent to voting in time of war and for a certain period after its termination.

Voters in military service must comply with the laws relating to payment of poll tax and to obtaining exemption certificates to the same extent and

in the same manner as civilian voters. The regular receipt form should be used for their poll tax receipts.

Yours very truly,

JOHN BEN SHEPPERD
Attorney General

By [Signature]
MARY K. WALL
Assistant

APPROVED:
John Atchison
Reviewer

Robert S. Trotti
First Assistant

**2. Opinion No. C-173, rendered November 6, 1963.**

Honorable Jack N. Fant
County Attorney
El Paso County
El Paso, Texas

Opinion No. C-173
Re: Construction and constitutionality of Article 5.02, Texas Election Code, relative to voting by members of the Armed Forces while on active duty.

Dear Sir:

You have requested an opinion on the construction and constitutionality of the following provisions in Article 5.02, Vernon's Texas Election Code, which were added by an amendment enacted by the 58th Legislature (Acts 58th Leg., 1963, ch. 424, sec. 13):

"Notwithstanding any other provision of this section, any member of the Armed Forces of the United States or component branches thereof who is on active duty in the military service of the United States may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces. This restriction applies only to members of the Armed Forces who are on active duty, and the phrase 'time of entering such serv-

ice' means the time of commencing the current active duty. A re-enlistment after a temporary separation from service upon termination of a prior enlistment shall not be construed to be the commencement of a new period of service, and in such case the county in which the person resided at the time of commencing active service under the prior enlistment shall be construed to be the county of residence at the time of entering service."

You have also asked for an opinion on corresponding provisions in Article 5.02 of the Election Code as amended by Chapter 430, Acts 58th Legislature, which will take effect and supersede the above-quoted provisions if the proposed constitutional amendment abolishing payment of the poll tax as a prerequisite for voting is adopted at the election to be held on November 9, 1963. These provisions are quoted at a later point in the opinion.

You have asked the following questions:

"1. What construction or interpretation does your Department make of the first sentence in paragraph two of Article 5.02, Texas Election Code, as amended, which reads: 'Notwithstanding any other provision of this section, any member of the Armed Forces of the United States or component branches thereof who is on active duty in the military service of the United States may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces.'?

"2. What construction or interpretation does your Department make of the remaining two sentences in paragraph two of Article 5.02?

"3. What is meant by the term 'temporary separation' in the third sentence of paragraph two of Article 5.02?

"4. In the event the poll tax amendment is adopted at the election to be held on November 9, 1963, then what construction do you make of the amended portion of Article 5.02, Texas Election Code, effective February 1, 1964, which reads: '* * * provided that any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which such person resided at the time of entering such service.'?

"5. Are the provisions contained in Article VI, Section 2 of the Texas Constitution and amended Article 5.02 of the Texas Election Code, as pertains to the right of members of the Armed Forces to vote in Texas, violative of or repugnant to Section 1 of the 14th Amendment to the United States Constitution?"

Section 1 of Article VI of the Texas Constitution enumerates the classes of persons who are not allowed to vote in this State. Section 2 of Article VI sets out the qualifications and requirements for voting. The general qualifications are stated as follows:

"Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; and provided further, that any voter who is subject to pay a poll tax under the laws of the State of Texas shall have paid said tax before offering to vote at any election in this State and hold a receipt showing that said poll tax was paid before the first day of February next preceding such election. * * *"

Prior to 1954, a provision in Section 1 of Article

VI disqualified members of the regular military establishments from voting in this State. The historical background of this provision is described in a commentary published in Vernon's Annotated Texas Statutes, Volume 9, page XVII, in the year 1952:

> "The Second Congress [of the Republic of Texas] in 1837 enacted the first election law * * *. This first act contained a novel section providing 'that regular enlisted soldiers, and volunteers for during the war, shall not be eligible to vote for civil officers.' This provision was no doubt inspired by the mutinous conduct of the nonresident volunteers who had been recruited in the United States after the Battle of San Jacinto. They had defied the provisional government and on one occasion in July, 1836, had sent an officer to arrest President David G. Burnett and his cabinet to bring them to trial before the army. They had continued their rebellious conduct after Sam Houston became the first president under the Constitution of 1836. It was not until May, 1837, that Houston was able to dissolve the army and eliminate this threat to civil authority. This provision disfranchising soldiers in the regular army was placed in the 1845 Constitution of the State of Texas and has remained in each succeeding constitution. It was modified in 1932 to exempt the National Guard and reserves and retired officers and men."

In 1954, Section 1 of Article VI was amended to delete the disqualification against persons in military service, and Section 2 was amended to add the following provision:

> "* * *Any member of the Armed Forces of the United States or component branches thereof or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Two former opinions of this office, Opinion S-148 dated December 18, 1954, and Opinion WW-157 dated July 8, 1957, have dealt with several questions of construction arising under the 1954 amendment of the Constitution. The following quotation is from Opinion S-148:

> "Formerly, National Guardsmen, reservists and draftees in active service could vote at the place of their legal residence at the time of voting (provided they had resided within the State for one year and within the county for six months) without regard to the place of residence at the time they entered service. Active members of the regular establishment could not vote at all. Now, all these groups are qualified electors if they meet other requirements, but none of them may vote anywhere in Texas except in the county where they resided when they entered service. If a person in military service changes his legal residence to some place other than the county in Texas in which he resided at the time he entered service, he cannot vote in this State.
>
> "Throughout this opinion the term 'residence' means legal residence as distinguished from actual residence.
>
> "The constitutional amendment does not change the rules for determining what place is the legal residence of the voter, nor does it mean that in all circumstances a person in military service will be entitled to claim a voting residence in the county of which he was a resident at the time he entered service. Place of residence is still to be determined in the same way that it has always been. Absence from the county or State for the purpose of performing military service does not of itself cause a loss of residence, but it is possible for a person to abandon his old residence and acquire a new residence during time of service. Tex.Const. Art. XVI, Sec. 9; *Clark v. Stubbs,* 131 S.W.2d 663 (Tex. Civ.App. 1939); *Struble v. Struble,*

177 S.W. 2d 279 (Tex.Civ.App. 1943); *Pettaway v. Pettaway,* 177 S.W.2d 285 (Tex.Civ.App. 1943); *Robinson v. Robinson,* 235 S.W.2d 228 (Tex.Civ.App. 1950); 15 Tex. Jur. 715, Domicile, Sec. 6. If he does so, and thereby changes his residence to some other county, he loses his right to vote in this State while he continues in service, unless he re-establishes his residence in the county in which he resided when he entered service. Further, no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.

"It is our opinion that the restriction to voting in the county of residence at the time of entering service applies only to persons who are on extended active duty. Members of the National Guard and reservists who are not on extended active service and retired military personnel are not subject to this restriction. Further, 'county of residence at the time of entering such service' means the county in which the person resided at the time he began his current active service. To illustrate: A person, while residing in County A, joins one of the reserve components but does not go into active service. He later moves to County B. After he has fulfilled the length of residence requirement, he may vote in County B; in fact, he could vote nowhere else. While living in County B, he is called into active service. During this time his place of voting is in County B, the county in which he resided when he went into active service. After his release from that tour of duty, he changes his residence to County C. His place of voting is in County C so long as he continues to live there. If he is again called into active service while living in County C, that is the place where he will vote."

The question in Opinion WW-157 was whether a person who had been stationed at an air base in Victoria County, who after discharge had subsequently re-enlisted, with some period of time intervening be-

tween the discharge and re-enlistment, was qualified to establish a domicile for voting purposes in Victoria County. In answer, the opinion said:

"What is meant by 'the time of entering such service' within the meaning of the Constitution? Is it the time of subsequent enlistment or the time of the original entry into service? If the subsequent period of service is a mere continuation of the prior period, the time of re-enlistment is not the time of entering such service within the meaning of the Constitution, for the restriction lasts 'so long as he or she is a member of the Armed Forces.'

"No doubt, in some instances an airman may be completely separated from the service in a very real sense by discharge and later re-enlist. In such cases it cannot be said that his re-enlistment or decision to re-enlist constituted the second period of service a continuation of the prior period of service, and the time of entering such service within the meaning of the Constitution is the time of his re-enlistment. The mere fact that there has been a discharge and a time lapse between the date of discharge and the date of re-enlistment is not, however, controlling on this question. The law looks to the substance and not to the mere form of the transaction. It can be judicially noted that frequently re-enlistment papers are actually signed prior to discharge and postdated at some later date to the discharge date. On some occasions the service man retains the same privileges, rank, and status as well as the same organization assignment and job assignment in the subsequent enlistment as in the prior period of service. In such cases the discharge and re-enlistment are mere legal fictions and the subsequent period of service is merely a continuation of the prior period. The date of re-enlistment is not the 'time of entry into such service' within the meaning of the Constitution. Residence in Victoria, Texas, at that time alone cannot be used as a basis of claiming

voting residence in Texas during the subsequent period of service.

"Therefore, we hold that an airman stationed at an air base located in Victoria County who receives a bona fide discharge and who completely severs his active duty relation with the Air Force and subsequently re-enlists with some period of time intervening between discharge and re-enlistment is qualified to establish a residence in Victoria County for voting purposes if the discharge and re-enlistment are not mere legal fictions so as to constitute a continuation of the prior period of service."

Articles 5.01 and 5.02 of the Election Code are the statutory counterparts of Sections 1 and 2 of Article VI of the Constitution. Following the amendment of the Constitution in 1954, no corresponding change was made in the statutes until this year, when a series of amendments to the Election Code were enacted in Senate Bill 61, Chapter 424, Acts of the 58th Legislature, 1963.

Senate Bill 61 was drafted by an interim Election Law Study Committee created by the 57th Legislature (S.C.R. 30, 57th Leg., R.S. 1961). The files and reports of the Committee reveal that the amendment to Article 5.02 undertook to express in statutory form the constitutional provision as interpreted in the opinions of the Attorney General. The second sentence of the new paragraph in Article 5.02 states the holding of Opinion S-148 which construed the restriction on place of voting as applying only to periods of active service. The third sentence undertakes to summarize in a brief statement the holding of Opinion WW-157 on the effect of a temporary break in service between enlistment periods.

We are in agreement with the construction given

to the constitutional provision in Opinions S-148 and WW-157. And we are further of the opinion that the construction of the constitutional provision is applicable to Article 5.02. We therefore believe that those opinions sufficiently answer your first two questions.

In answer to your third question, as to the meaning of "temporary separation" in Article 5.02, we think the term was intended to mean a separation under circumstances described in Opinion WW-157 which would not prevent the subsequent period of service from being in essence merely a continuation of the prior period. It is not possible to lay down a blanket rule setting out the circumstances in detail, as each case must be determined on its own particular set of facts as to the acts and intention of the individual.

Two examples will illustrate how these provisions operate. Suppose a soldier, while stationed at Fort Bliss in El Paso County, has established his legal residence there (but without voting rights, because he did not reside in that county at the time of entering service) and intends to live there after eventual retirement from military service. He completes an enlistment and is discharged, but at all times his intention for the present is to re-enlist and continue in military service. Even though some period of time may elapse between his discharge and his re-enlistment, the two enlistments would ordinarily constitute one continuous period of service within the meaning of these provisions. Suppose, however, that at the time of his discharge he has no intention of re-entering military service. After seeking employment he finds nothing to his liking and he thereupon decides to go back into military service. Ordinarily this would be the beginning of a new period of service, and he could vote in El Paso County if otherwise qualified.

The Constitution provides that a person in military service may vote only in the county in which he resided at the time of entering service. (It should be noted that the place of voting is the county of residence, not the county in which the enlistment occurred, which might be in some other place than the place of legal residence.) In a brief submitted to this office by an interested organization, the contention is made that this provision of the Constitution attempts to regulate voting rights outside Texas as well as within the State. It goes without saying that the Texas Constitution cannot regulate voting rights of persons at any place other than within the State of Texas, and cannot affect the voting rights of residents of other States while stationed in Texas. This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after entering service. If the only place at which a person may vote in this State is the county in which he resided at the time of entering service, and if at that time he did not reside in any county in Texas, it follows that he cannot vote in this State. Accordingly, it was said in Opinion S-148 that no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.

It has been suggested in the brief that the provisions under consideration do not preclude a nonresident of Texas from establishing a legal residence and becoming a qualified elector having the privilige to vote in Texas; that a resident of Texas who enters military service cannot change his voting residence while on active duty, and that a former nonresident, after having acquired a voting residence while on active duty in this State, cannot thereafter change it to some other county, but that a resident of another State can ac-

quire an original voting residence in Texas while in military service.

We are unable to find support for this suggestion, either in the language used or in the reason for the restriction. As we view it, the purpose of the restriction is to prevent a concentration of military voting strength in localities where military installations are situated, which "might well lead to complete domination and control of local politics by the overwhelming number of military men to the prejudice of the civilian citizens of the community." Interpretive commentary under Art. VI, Sec. 1, Vernon's Ann. Tex. Const., Vol. 2, p. 336. The concentration sought to be prevented could come about from voting by former residents of other States as readily as from voting by former residents of other counties in this State. We fail to see the rationale for allowing a resident from some other State who is stationed at Fort Bliss to acquire a voting residence in El Paso County, while denying that privilege to a resident of Texas; nor do we see any rationale for freezing his voting residence in El Paso County if he is transferred to a military installation in some other county or State.

We are not impressed by the suggested explanation that the person who resided in Texas at the time of entering service does have a place to vote in Texas (i.e., the county of his residence at the time of entering service), but the person who resided in some other State at the time of entering service would have no place to vote in Texas if he could not acquire a voting residence at the place where he was stationed. The 1954 amendment evinces an intention to remove the disfranchisement of active members of the regular military establishments, but subject to the limitation that they will not be allowed to acquire a new voting residence in

this State while in military service. It does not show an intention to enfranchise any person or class of persons in military service on any other terms. It should be kept in mind that a person who enters military service as a resident of some other State gives up his voting residence in that State only by his own volition. So far as we are able to find, there is not a State in the Union whose laws cause a resident to lose his residence and concomitant voting rights against his will by reason of absence in military service. If he loses his residence and voting privileges at the place where he resided when he entered service, it is by his own desire to acquire a new residence at a different place. You have stated that many of the military personnel tell you that when they write to the State and county where they entered the service, so as to vote absentee there, that State takes the position that they have now lost their residence there. In these cases, it would seem that the individual by his own voluntary acts has relinquished his former residence or that the administrative officers of his home State have misinterpreted the law of that State.

It has also been suggested that the law discriminates against residents of other States and is therefore repugnant to the 14th Amendment of the United States Constitution. We do not agree that it discriminates against nonresidents. A Texas resident is under the same limitation as a nonresident. No matter how much a soldier at Fort Bliss might prefer El Paso County to his home county in East Texas, or North Texas, or South Texas, and might want to make El Paso his county of legal residence, he has to choose between acquiring a domicile in El Paso County and losing his right to vote, for if he does change his residence to El Paso County he also is left without a voting place.

It is true that military men who have been many years away from their place of residence at the time of entering service may lose interest in the affairs of that locality, but may be keenly interested in the affairs of the locality where they are stationed, and the privilege of retaining their voting residence at the former place may be to them an empty one. It is also true that the Texas resident stationed in Texas could still vote for state offices and on state-wide issues of interest to him, whereas the resident of some other State would find no area of interest in the elections of his home State except for President and Vice-President of the United States. These are considerations going to the policy, wisdom, and equity of the constitutional restriction, rather than to its interpretation. We hasten to state that our function is merely to construe the provisions as they are written.

In your fourth question you ask for a construction of the provision on military voting in the amendment of Article 5.02 of the Election Code which will take effect if the proposed constitutional amendment abolishing payment of the poll tax as a prerequisite for voting is adopted at the election to be held on November 9, 1963. Acts 58th Leg., 1963, ch. 430, sec. 1, p. 1103. The pertinent portion of the proposed amendment of Article VI, Section 2 of the Constitution reads:

> "Section 2. Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided that any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote

only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces; and provided further, that before offering to vote at an election a voter shall have registered if required by law to do so. * * *"

Insofar as it concerns place of voting by persons in military service, there is no change in the meaning of the section although the language has been rearranged. The text of Article 5.02 of the Election Code, as amended to take effect in event of adoption of the constitutional amendment, is as follows:

"Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such person offers to vote, and who shall have registered as a voter if required to do so, shall be deemed a qualified elector; provided that any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which such person resided at the time of entering such service. * * *"

This provision tracks the proposed constitutional amendment, except for omission of the words "so long as he or she is a member of the Armed Forces." Since the provision deals with the voting place of members—not former members or future members—of the Armed Forces, the omission of the qualifying clause does not change its meaning. Unlike the amendment enacted by Chapter 424, this version of the statute does not contain the provisions incorporating the interpretations of the Attorney General's opinions. But the addition of those provisions did not alter existing law; it merely

verbalized the existing law into statutory form. Accordingly, the law as it will exist if Chapter 430 takes effect will be the same as it is now.

Your fifth question is whether the constitutional and statutory provisions under consideration violate Section 1 of the 14th Amendment to the United States Constitution, which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We have seen that the law of this State completely disfranchised all persons in military service for almost a hundred years and disfranchised members of the regular establishments for twenty more years. If those provisions did not offend the Federal Constitution, it is evident that the less drastic provisions of the present law also are not subject to that infirmity. The 14th Amendment was ratified in 1868. During the intervening years before Section 1 of Article VI of the Texas Constitution was amended in 1954, there was no case directly raising the validity of the Texas law, but the implication in two cases decided by the Texas courts seems to be that the State had the power to withhold suffrage from persons in military service. In *Savage v. Umphries,* 118 S.W. 893, 899 (Tex.Civ.App. 1909), the court said:

> "Who shall exercise suffrage is a fundamental question, which the body politic must decide upon a just view of the true relation between the power

of the suffragans and the rights of the whole people. Hence the exercise of the elective franchise is not a natural or God-given right, but is, as the word 'franchise' implies, a right conferred by the state or body politic. In other words, as is said by an eminent authority on constitutional law, the questions whether one is fitted by intelligence to perform the function of an elector, or has such interests in the matters controlled through his suffrage as to check the misuse of power which self-interest prompts, or has such community of interest in the laws which are to govern the community, which should fit him for the discharge of the duties of a suffragan, must be determined by the body politic."

One of the holdings in that case was that under Article VI, Section 1 of the Texas Constitution, a person in the service of the army of the United States was not entitled to vote at all. 118 S.W.2d at page 908. In *McBeth v. Streib,* 96 S.W. 2d 992, 995 (Tex. Civ. App. 1936), the court said:

"Our organic and statutory laws, in plain terms, deny the right of franchise to citizens in the military service. The reasons for such denial were properly determined by the adopters of the Constitution and members of our lawmaking bodies."

*Solon v. State,* 54 Tex.Crim. 261, 114 S.W. 349, 352 (1908) describes the nature of suffrage as follows:

" * * * The true rule is that the right to vote is not a necessary or fixed incident of citizenship, or inherent in each and every individual, but that voting is the exercise of political power, and no one is entitled to vote, unless the people in their sovereign capacity, have conferred on him the right to do so. It may be laid down as a general proposition that the right of suffrage may be regulated and modified or withdrawn by the authority which conferred it. * * * In the case of State v.

Dillon, 32 Fla. 545, 14 So. 383, 22 L.R.A. 124, in treating this general subject, the court say: 'The right to vote is not an inherent or absolute right found among those generally reserved in bills of rights, but its possession is dependent upon constitutional or statutory grant. Subject to the limitations contained in the federal Constitution, the elective franchise is under the control of the sovereign power of the states, expressed in Constitutions or statutes properly enacted. * * *' "

The United States Constitution does not confer on or guarantee to citizens the right to vote, but it does limit the power of a State to abridge or deny to some citizens a right of suffrage which the State has granted to others. 18 Am.Jur., Elections, §§ 46, 47; 29 C.J.S., Elections, §§ 5-8. The 15th and 19th Amendments prohibit denial of the right to vote because of race, color, previous condition of servitude, or sex. The 14th Amendment prohibits a State from abridging the privileges or immunities of citizens of the United States or from denying the equal protection of the laws to any person within its jurisdiction; but these prohibitions do not preclude a State from making reasonable classifications of persons or things for the purpose of legislation if all within the same class are treated alike. The general principles on the validity of classifications are stated in the following quotations from 16A C.J.S. 240 et seq., Constitutional Law, § 489:

"Class legislation is invalid where the classification is arbitrary and unreasonable. The provision of the Fourteenth Amendment to the federal Constitution declaring that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deny to any person within its jurisdiction the equal protection of the laws, as well as provisions commonly found in state constitutions prohibiting the enactment of laws granting any special or

exclusive privileges, immunities, or franchises, * * * render void all state statutes which make any unreasonable or arbitrary discrimination between different persons or classes of persons. * * *

"There is no general rule by which to distinguish a reasonable and lawful from unreasonable and arbitrary classification, the question being a practical one, dependent on experience, and varying with the facts in each case. In order to be valid a statutory classification must reasonably promote some proper object of public welfare or interest, must rest on real and substantial differences, having a natural, reasonable, and substantial relation to the subject of the legislation, and must affect alike all persons or things within a particular class, or similarly situated; but, if the legislature has power to deal with the subject matter of the classification and there is a reasonable ground for the classification and the law operates equally on all within the same class, it is valid, even though the act confers different rights or imposes different burdens on the several classes, or fails to provide for future contingencies, or though particular persons find it difficult or even impossible to comply with conditions precedent on which the enjoyment of the privilege is made to depend. * * *

"In determining whether or not a basis of classification is reasonable, it must be looked at from the standpoint of the legislature enacting it, and with reference to the conditions existing when the statute was enacted, not when the constitution was adopted. As discussed supra § 151 (4), the question of classification is one primarily for the legislature, and in the exercise of this power the legislature possesses a wide discretion. A statute will be sustained where the basis for classification made by it could have seemed reasonable to the legislature, even though such basis seems to the courts to be unreasonable. In view of the presumptions in favor of a legislative classification, as discussed supra § 100, the legislative judgment as to

classification will be upheld if any state of facts can reasonably be conceived to sustain it, and can be overthrown by the courts only when it is clearly erroneous."

The Texas Constitution classifies persons in military service for special treatment in conferring the right to vote, and accords the same treatment to all within that class. We are unable to say that there is no rational basis for the classification, and consequently it is our opinion that the provision does not violate the 14th Amendment to the United States Constitution.

SUMMARY

The provisions of Article 5.02, Vernon's Texas Election Code, as amended by Chapter 424, Acts of the 58th Legislature, 1963, which pertain to voting by persons in military service, do nothing more than restate the law as contained in the 1954 amendment to Article VI, Section 2 of the Texas Constitution. Attorney General's Opinions S-148 and WW-157, interpreting the constitutional provisions, are reaffirmed.

The law on voting by persons in military service, as contained in the amendment to Article VI, Section 2 of the Constitution which is proposed by S.J.R. No. 1, 58th Legislature (to be submitted to a vote on November 9, 1963) and in Article 5.02 of the Election Code, as amended by Chapter 430, Acts of the 58th Legislature, which will take effect if the proposed constitutional amendment is adopted, is the same as the present law.

The provisions of Article VI, Section 2 of the Texas Constitution, and of Article 5.02 of the Texas Election Code, which provide that members of the Armed Forces of the United States may

vote only in the county in which they resided at the time of entering service, does not violate the 14th Amendment to the United States Constitution.

Yours very truly,

WAGGONER CARR
Attorney General

By [Signature]
MARY K. WALL
Assistant

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